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IN THE COURT OF CRIMINAL APPEALS

MICKEY RAY PERKINS
Appellant,
v.
STATE OF TEXAS
Appellee.

ON APPEAL FROM THE 35TH JUDICIAL DISTRICT COURT
BROWN COUNTY, TEXAS
CAUSE NUMBER CR24903
And
CAUSE NUMBER 11-18-00037-CR
COURT OF APPEALS FOR THE ELEVENTH JUDICIAL DISTRICT
EASTLAND, TEXAS

BRIEF ON THE MERITS FOR THE STATE OF TEXAS

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IDENTITY OF PARTIES AND COUNSEL

Pursuant to Rule 74(a) of the Texas Rules of Appellate Procedure the State lists the names and addresses of all parties to the Trial Courts final judgment and their trial counsel in the trial court.

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STATEMENT OF THE CASE

Mickey Ray Perkins, hereinafter Appellant, was charged by indictment on December 15, 2016 with the offense Aggravated Assault with Deadly Weapon—Family Member.[1] On January 25, 2018, following a jury trial, a jury found Appellant guilty of the indicted offense.[2] That day, the jury assessed Appellant's punishment at 27 years in the Institutional Division of the Texas Department of Criminal Justice and a $5000 fine.[3] On January 31, 2018, Appellant timely filed notice of Appeal.[4] On February 28, 2020, the Eleventh Court of Appeals affirmed Appellant's conviction in a memorandum opinion.[5]

REPLY ISSUE ONE

The Court of Appeals was correct in holding that the trial court did not abuse its discretion in admitting extraneous offense evidence against Appellant.

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[1] CR 13.
[2] 10 RR 43.
[3] 10 RR 73.
[4] CR 149.
[5] *Mickey Ray Perkins v. State of Texas*, No. 11-18-00037-CR, 2020 WL 976941 (Tex. App.—Eastland 2020, pet. granted).

STATEMENT OF FACTS

On August 30, 2016, Appellant met up with Lana Hyles, his ex-girlfriend, outside the Brownwood hospital to borrow her car.[6] Appellant had said he would drop her off at her apartment, but began to drive in a different direction.[7] The discussion escalated into an argument, and Appellant slammed Hyles's face into the dashboard.[8]

Hyles opened the door and left the vehicle while it was still moving to escape Appellant.[9] Then, Appellant knocked her to the ground and then tried to pull her by her hair back into the vehicle.[10] At that point, Carol Weathermon, a stranger to both people, drove by and intervened by honking on her horn.[11] Appellant then drove away, and Weathermon drove Hyles to the hospital.[12]

The assault left Hyles with black eyes and a swollen, bloody nose, which resulted in a permanent scar.[13]

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[6] 8 RR 88.
[7] 8 RR 89.
[8] 8 RR 90.
[9] 8 RR 91–92.
[10] 8 RR 20.
[11] 8 RR 21.
[12] 8 RR 22–25.
[13] 8 RR 96; State's Exhibits 2–5.

SUMMARY OF THE ARGUMENT

Evidence of Appellant's extraneous assault against Sarah Rogers was relevant to show motive, intent, plan, and lack of accident. This evidence was significantly more probative than prejudicial, and Appellant's proposed stipulation would not have reduced the State's need for the evidence. As such, the trial court did not abuse its discretion by admitting evidence of the extraneous offense.

ARGUMENT

1. Standard of Review

Evidence of extraneous bad acts is admissible to show "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident," or any other fact apart from character conformity relevant to the case.[14] Extraneous evidence is also admissible to rebut a defensive theory.[15] Relevant extraneous offense evidence is admissible so long as its probative value is not substantially outweighed by its prejudicial effect.[16]

A trial court's ruling as to the admissibility of extraneous offense evidence is reviewed for abuse of discretion, and will be upheld so "long as the trial court's

[14] Tex. Rules of Evid. Rule 404(b).
[15] *See Bass v. State*, 270 S.W. 557, 563 (Tex. Crim. App. 2008).
[16] *De La Paz v. State*, 279 S.W.3d 336, 343–44 (Tex. Crim. App. 2009).

ruling is within the 'zone of reasonable disagreement.'"[17] Further, the ruling will be upheld if the evidence was admissible on any theory of law, "even if the trial judge gave the wrong reason for his right ruling."[18]

a. Evidence of Appellant assaulting his ex-girlfriend was admissible to show Appellant's motive, intent, and plan, to show lack of accident, and to rebut the defensive theory that the victim fabricated her recollection.

Because "domestic violence often occurs in secrecy, pitting one person's word against another's," the State may depend on extraneous offense evidence demonstrating "the defendant's attitude, relevant to culpable intent, and willingness to act on it, relevant to the prohibited conduct."[19] In *Grider*, the Texarkana court noted that similarities between two domestic violence offense in the form of similar relationships, similar means of causing injury, and similarly fabricating stories to explain the injuries away as accidents are relevant to show "a common plan, scheme, or system."[20]

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[17] *Id.*
[18] *Id.* at 344.
[19] *Grider v. State*, 69 S.W.3d 681, 688–89 (Tex. App.—Texarkana 2002, no pet.) (holding that admitting evidence of similar extraneous offenses is often necessary in domestic violence cases.) (citing *Montgomery v. State*, 810 S.W.2d 372, 394 (Tex. Crim. App. 1990, en banc) which held that for crimes like sexual abuse of children which occur in secrecy, evidence of other similar acts may be relevant to show intent and willingness to act on that intent.).
[20] *Grider*, 69 S.W.3d at 689.

The State introduced evidence of one extraneous offense through the testimony of Sarah Rogers, Appellant's ex-girlfriend.[21] Hyles testified that she began dating Appellant in August 2015.[22] About six months later, Appellant assaulted Hyles.[23] During the assault, Appellant "forcefully hit" her "in the head."[24] After hitting her in the bedroom, appellant dragged her "by the . . . hair into the living room."[25] Among other injuries, this assault resulted in a black eye and scratches on her face.[26]

In both this case and the extraneous offense introduced at trial, Appellant assaulted his girlfriend after being in a relationship for about six months, by hitting her face and by dragging her by the hair.[27] In both cases, Appellant alleged that the injuries occurred by accident:[28] In the principal case, he argued that Lana Hyles was injured because he braked suddenly and she was not wearing a seatbelt;[29] in the extraneous assault, Appellant alleged that he shoved Sarah Rogers because he

[21] 9 RR 38–39.
[22] 9 RR 38.
[23] 9 RR 39–41.
[24] 9 RR 41–42.
[25] 9 RR 43.
[26] 9 RR 45.
[27] 8 RR 20–21, 90–92; *cf.* 9 RR 43 (showing similar means of assault). 8 RR 86–87; *cf.* 9 RR 38–39 (showing similar time elapsed between when Appellant began dating the women and when he assaulted them).
[28] In addition to alleging the injuries occurred by accident in statements to law enforcement, Appellant's counsel opened the door to this theory while cross-examining Lana Hyles by asking if she "slammed the truck into park while it was still moving." 8 RR 118.
[29] 9 RR 139.

thought she was a stranger in his bed and that she accidentally hit her head on the nightstand.[30]

The extraneous offense evidence is also relevant under what this Court has upheld as the doctrine of chances. Under the "doctrine of chances," this Court held that "highly unusual events are unlikely to repeat themselves inadvertently," and evidence of this repetition is relevant to show that Appellant's narrative is "objectively unlikely."[31] Both times Appellant was confronted about injuries to his girlfriend, Appellant shifted blame, claiming that Sarah Rogers's injury was an "accident," and that when Lana Hyles ended up with similar injuries six months later, he just happened to be "in the wrong place at the wrong time."[32] Evidence showing this case to be the second time in less than a year that Appellant's girlfriend "accidentally" ended up with a black eye and a bloody nose undermines Appellant's narrative, and is just the sort of evidence this Court acknowledged in upholding the doctrine of chances.

Because the extraneous offense was similar to the principal offense and relevant to show motive, intent, plan, lack of accident, and to rebut the defensive theory that

[30] 9 RR 91.
[31] *De La Paz v. State*, 279 S.W.3d 336, 347 (Tex. Crim. App. 2009).
[32] 9 RR 122 ("I sat there for three days freaking out over an accident."); 9 RR 163 ("Not really like that, but there was nothing to tell on me. She put the car in park. She inflicted that upon herself. I was in the wrong place at the wrong time.").

the victim fabricated the assault, the trial court's decision to admit the evidence should be affirmed.

b. The probative value of the extraneous offense evidence outweighed any potential prejudice.

In his brief, Appellant argues that even if the evidence is relevant, the relevance is "de minimis, particularly in the face of an offer of stipulation."[33] Contrary to this assertion, evidence of an extraneous assault would be significantly less probative and no less prejudicial if it was limited to a cursory stipulation of the offense without the critical details linking the two offenses. These similar details are numerous, and support the admission of the extraneous offense evidence under rule 403.

To exclude relevant evidence under Rule 403, Appellant must show that the probative value of the evidence is substantially outweighed by the prejudicial effect.[34] A reviewing court will uphold a trial court's determination so long as the trial court's ruling was "within the 'zone of reasonable disagreement.'"[35] In making a Rule 403 determination, the court considers the following factors:[36]

1) How compellingly the extraneous offense evidence serves to make a fact of consequence more or less probable;

[33] Appellant's Brief, page 15.
[34] Tex. Rules of Evid. 403.
[35] *De La Paz*, 279 S.W.3d at 343–44.
[36] *Wyatt v. State*, 23 S.W.3d 18, 26 (Tex. Crim. App. 2000).

2) The potential the other offense evidence has to impress the jury "in some irrational but nevertheless indelible way;"

3) The time the proponent will need to develop the evidence, during which the jury will be distracted from consideration of the indicted offense;

4) The force of the proponent's need for the evidence

The first factor in this case favors the State. The extraneous offense occurred just six months prior, and involved similar injuries, similar actions by Appellant, and similar victims. The significant similarities between the extraneous offense and the offense at issue are highly probative of Appellant's motive, plan, and intent, and rebutted the defense's theory that the injuries were accidental.

The second factor also favors the State. While there is some risk of prejudice from the extraneous assault, the facts of that assault are not especially inflammatory given its similarity to the principal offense. Furthermore, the trial court instructed the jury that they could only consider extraneous offense evidence in "determining the intent, motive," or "absence of mistake or lack of accident," or "to rebut a defensive theory."[37] There is a presumption on appeal that "the jury follows the trial court's instructions in the manner presented."[38] Because Appellant has not presented any evidence to rebut this presumption, this Court must presume that the jury did not consider the extraneous offense evidence for improper purposes.

[37] 9 RR 36.
[38] *Thrift v. State*, 176 S.W.3d 221, 224 (Tex. Crim. App. 2005).

The third factor is neutral. Though Appellant alleges that forty pages of the record are dedicated to extraneous offense testimony, the total is thirty-four; Sarah Rogers spends some time testifying about facts directly relating to the principal offense.[39] While thirty-four pages of record spent on extraneous offense witnesses is significant, it only constitutes about eleven percent of the testimony before the jury.[40] In *Wilson v. State*, 473 S.W.3d 889, 906 (Tex. App.—Houston [1st Dist.] 2015, pet. ref'd.), the 1st Court of Appeals held that fifty-five out of about five-hundred pages, or about eleven percent, was not "an inordinate amount of time presenting the extraneous-offense evidence." In these pages of testimony, the State remained focused on the similarities between the offenses and did not stray from evidence relevant to the principal case.

The fourth factor also favors the State. The portion of the assault which resulted in serious injury to Lana Hyles occurred in her car, and the only witnesses to the injury were Hyles herself and Appellant, who claimed she had fabricated the assault.[41] Carol Weathermon, the good Samaritan witness, did not observe the critical portion of the assault which caused serious injury to Hyles's face. The State's

[39] 9 RR 48–53.
[40] The record contains approximately 300 pages of testimony before the jury. 34/300 is about 11%.
[41] 9 RR 151.

case rested heavily on the relative credibility of Hyles and Appellant.[42] As such, the State was justified in introducing extraneous offense evidence to support Hyles's account of the events.

Appellant argues that the necessity of the testimony was reduced due to Appellant's willingness to stipulate to the prior assault.[43] But the State is entitled to present its evidence as it sees fit, and is not required to agree to a stipulation.[44]

Furthermore, a stipulation to a prior assault would not serve the State's purpose in introducing the offense, which was to show motive, plan, intent, and lack of accident, and to rebut a defensive theory of fabrication. Appellant argues without citing authority that because the extraneous evidence was admitted to show lack of accident and rebut a defensive theory, "this is not a case where the minute details of a prior offense are essential to the purpose for admission."[45] However, this Court in *De La Paz* expressly recognized that evidence of "other nearly identical acts of purported fabrication" is relevant to rebut a defensive theory.[46]

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[42] *See Grider v. State*, 69 S.W.3d 681, 689 (Tex. App.—Texarkana 2002, no pet.), holding that extraneous offense evidence is particularly necessary in domestic violence offenses where the credibility of the witnesses is at issue and the defendant is alleging that the assault was fabricated and the injuries occurred by accident.
[43] Appellant's Brief page 20.
[44] *See Rodriguez v. State*, 373 S.W.2d 258, 259 (Tex. Crim. App. 1963).
[45] Appellant's Brief page 21.
[46] 279 S.W.3d 336, 346–47 (Tex. Crim. App. 2009).

The need for details beyond a stipulation is apparent in how the State used the evidence. The State presented evidence that in each offense, the assault occurred about six months into the relationship, in response to arguments following a deterioration of the relationship, which shows motive and intent.[47] The State presented evidence that in each offense, Appellant struck the victim in the face and pulled her by the hair, showing plan and method.[48] The State further presented evidence that Appellant minimized each assault as accidents, showing lack of accident and rebutting his theory of fabrication.[49]

Appellant relies on *Robles* for the contention that a court should "suppress evidence of prior convictions . . . when the defendant offered to stipulate to the prior convictions."[50] However, this Court's holding in *Robles* applies specifically to "offers to stipulate that *jurisdictional* convictions exist."[51] Unlike extraneous offenses admitted under 404(b), those admitted for the simple purpose of fulfilling a jurisdictional requirement such as for a third DWI do not require evidence of any surrounding facts: The admission fully satisfies the stated reason for admitting extraneous offense evidence. Texas Appellate Courts have applied *Robles* in just that

[47] 8 RR 85–86; 9 RR 87–88.
[48] 8 RR 19–21; 9 RR 14–16.
[49] 9 RR 163; 9 RR 122.
[50] Appellant's Brief pages 20–21; *Robles v. State*, 85 S.W.3d 211, 212–13 (Tex. Crim. App. 2002).
[51] *Robles*, 85 S.W.3d at 213 (emphasis added).

way to stipulations of jurisdictional offenses, but have not extended the rule to offenses admitted under 404(b).[52]

In *Robles*, a stipulation to an extraneous DWI formed a perfect fit with the jurisdictional element, making further evidence redundant.[53] The extraneous offenses in this case goes to Appellant's intent, plan, and lack of accident; to make presentation of evidence unnecessary via stipulation in accordance with *Robles*, Appellant's stipulation would have to be an admission of every relevant fact the State sought to prove with evidence of the extraneous offense. In such a fact-specific inquiry, a cursory stipulation that the offense occurred does not mitigate the State's need to present evidence.

Appellant did not stipulate to the elements the extraneous offense was relevant to prove, and for proving those elements the extraneous offense was more probative than prejudicial. As such, the trial court did not abuse its discretion by allowing the State to present evidence of the extraneous offense.

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[52] *See Donald v. State*, 543 S.W.3d 466, 480 (Tex. App.—Houston [14th Dist.] 2018, no. pet.) ("when the State alleges a prior conviction for jurisdictional purposes, a defendant may stipulate to the allegation and prevent the State from adducing evidence of the prior conviction other than the stipulation."); *see also Crawford v. State*, 496 S.W.3d 334, n.13 (Tex. App.—Fort Worth 2016, pet. ref'd.) (applying *Robles* specifically to jurisdictional offenses).

[53] *Robles*, 85 S.W.3d at 213 ("[E]vidence of the [jurisdictional] convictions' existence is not necessary if the accused stipulates to their existence because the statutory requirement has been satisfied.")

PRAYER

Therefore, the State respectfully requests that this Court affirm Appellant's conviction.

Respectfully submitted,

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The undersigned certifies that a true and correct copy of the foregoing brief was served by electronic service to Frederick Dunbar, Attorney at Law on the 12th day of November, 2020.

/s/Alexander R. Hunn

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The undersigned certifies that a true and correct copy of the foregoing brief was emailed to Stacey Soule at the State Prosecuting Attorney's Office at Stacey.Soule@SPA.texas.gov on the 12th day of November, 2020.

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